

# On “Violence Against Women”

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## I. INTRODUCTION

We all know the statistics. One in three women has experienced domestic violence.<sup>1</sup> Nearly one in five women has been raped.<sup>2</sup> Quite simply, it is not safe being a woman. Or a girl for that matter.<sup>3</sup> It is definitely not safe being a co-ed on campus.<sup>4</sup> Or a woman in prison.<sup>5</sup> Or a female gamer in the virtual world of gaming.<sup>6</sup> And there is danger on public streets, if the response to a viral video of a woman being catcalled in New York City is anything to go by.<sup>7</sup> Even women who have been trained to use physical violence are at risk. I am referring to the

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\* Stanley A. August Professor of Law, Brooklyn Law School. B.A. Princeton University; J.D. Columbia Law School. E-mail: [bennett.capers@brooklaw.edu](mailto:bennett.capers@brooklaw.edu). The genesis for some of the ideas contained in this Essay first originated in remarks given at a panel entitled “Sexual Assault and Violence Against Women” at the symposium “Locking Up Females, Failing to Protect Them, and Punishing Their Families and Children,” held at Southwestern Law School. So my first thanks go to my co-panelists from that event for a lively exchange of ideas. My second thanks go to Aya Gruber, the guest editor of this *Ohio State Journal of Criminal Law* symposium, for inviting me to participate in this symposium and prompting me to think more deeply about those earlier remarks, and to adapt those remarks into this Essay.

<sup>1</sup> NAT’L CTR. FOR INJURY PREVENTION AND CONTROL, CTR. FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT (2011), [http://www.cdc.gov/violenceprevention/pdf/nisvs\\_executive\\_summary-a.pdf](http://www.cdc.gov/violenceprevention/pdf/nisvs_executive_summary-a.pdf).

<sup>2</sup> *Id.* at 1.

<sup>3</sup> *Child Sexual Abuse Statistics*, THE NAT’L CTR. FOR VICTIMS OF CRIME, <http://www.victimsofcrime.org/media/reporting-on-child-sexual-abuse/child-sexual-abuse-statistics> (reporting 1 in 5 girls are victims of sexual abuse).

<sup>4</sup> See Jennifer Steinhauer, *Proposed Bill Targets Assaults on Campus*, N.Y. TIMES, July 31, 2014, at A14.

<sup>5</sup> See generally Brenda V. Smith, *Sexual Abuse of Women in United States Prisons: A Modern Corollary of Slavery*, 33 FORDHAM URB. L.J. 571, 572–74 (2006); ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ-231169, SEXUAL VICTIMIZATION IN PRISONS AND JAILS REPORTED BY INMATES, 2008–09 (2010).

<sup>6</sup> Amy O’Leary, *In Virtual Play, Sex Harassment is All Too Real*, N.Y. TIMES (Aug. 1, 2012), [http://www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html?4\\_r=0](http://www.nytimes.com/2012/08/02/us/sexual-harassment-in-online-gaming-stirs-anger.html?4_r=0); *Online Harassment Gets Real for Female Gamers*, NPR (Aug. 8, 2012), <http://www.npr.org/2012/08/08/158433079/virtual-harassment-gets-real-for-female-gamers>.

<sup>7</sup> Gail Sullivan, *Video: Woman Harassed 108 Times as She Walks Around New York*, WASH. POST (Oct. 29, 2014), <https://www.washingtonpost.com/news/morning-mix/wp/2014/10/29/video-woman-harassed-108-times-as-she-walks-around-new-york/>.

military, where sexual assault against female enlistees is endemic, and where we are still wringing our hands trying to figure out to what do to about it.<sup>8</sup>

Really, we are trying to figure out what to do about sexual violence against women everywhere. To be sure, there were broad reforms to sexual assault laws in the 1970s—passing rape shield rules, eliminating the marital rape exception, retiring the utmost resistance requirement—but the sense is those changes have been only somewhat successful in reducing sexual assault. Indeed, the problem of violence against women seems an intractable one. In 1994, Congress passed the Violence Against Women Act.<sup>9</sup> California has recently modified a sexual assault law.<sup>10</sup> And the American Law Institute is in the process of revising the sexual assault provisions of the Model Penal Code.<sup>11</sup> But mostly, we have been doing a lot of hand wringing.

The goal of this Essay is not to suggest further reform, even though I have championed reforms elsewhere.<sup>12</sup> Rather, the goal is to question the very concept of “violence against women.” Let me make sure up front that the record is clear: Violence against women is a serious problem, and reveals lacunae in the law and the culture. But is it possible we lose something—sight of the bigger picture? the goal of true gender equality?—when we talk about “violence against women”?

Let me say something else up front. This Essay does not purport to have definitive answers to those questions. But I do think these are questions worth asking.

I began this Essay by referring to the numbers we all know well. And certainly, when it comes to “violence against women,” as a framing device, and as a reality, there are advantages to numbers and statistics. But there are also advantages to stories.<sup>13</sup> I begin, in Part II, with three. Collectively, these three stories set the stage for the remainder of this Essay. In Part III and IV, I interrogate both the terms “women” and “violence.” The heart of the Essay, however, is in Part V, where I imagine other terminology, and imagine a criminal justice system that allows those treated as subordinates, as subjects, to become subjects in their own right

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<sup>8</sup> See Lisa M. Schenk, *Informing the Debate about Sexual Assault in the Military Services: Is the Department of Defense Its Own Worst Enemy?*, 11 OHIO ST. J. CRIM. L. 579, 580–85 (2014).

<sup>9</sup> Pub. L. No. 103-322, §108 Stat. 1902 (1994) (codified as amended in scattered sections of 8, 16, 18, 20, 28, and 42 U.S.C.).

<sup>10</sup> Aaron Mendelson, *California Passes ‘Yes-Means-Yes’ Campus Sexual Assault Bill*, REUTERS, (Aug. 29, 2014), <http://www.reuters.com/article/2014/08/29/us-usa-california-sexcrimes-idUSKBN0GT0U920140829>.

<sup>11</sup> *Model Penal Code: Sexual Assault and Related Offenses*, AM. LAW INST., <http://www.ali.org/projects/show/sexual-assault-and-related-offenses/>.

<sup>12</sup> See, e.g., Bennett Capers, *Real Rape Too*, 99 CAL. L. REV. 1259, 1265 (2011); I. Bennett Capers, *Real Women, Real Rape*, 60 UCLA L. REV. 826, 870–74 (2013).

<sup>13</sup> Of course, there is a rich tradition of storytelling in feminist scholarship. See generally Kathryn Abrams, *Hearing the Call of Stories*, 79 CAL. L. REV. 971, 1041, 1044–45 (1991).

## II. THREE STORIES

Three stories then. For reasons that will become clear, I may change some of the names and switch some of the details, but the gist of the stories will remain undisturbed. Even with the name changes, I am sure some of the stories will seem familiar from criminal law casebooks or the media.

*Story Number One.* A professional football player—let's call him Jay Tice—is on an elevator with his girlfriend at the Revel Casino Hotel in Atlantic City, New Jersey, where they are having an argument, which he decides to put an end to by punching her in the face.<sup>14</sup> And quite literally, the argument ceases since she is knocked out cold. In fact, he has to literally drag her limp, unmoving body to get her out of the elevator. Since we have become a nation where surveillance cameras are everywhere, including elevators at the Revel Casino Hotel, the entire incident is captured on videotape, which is then broadcast on the entertainment and gossip show TMZ.<sup>15</sup> Following the public outcry, a grand jury indicts Tice on charges of third degree assault. The very next day, Tice marries his girlfriend, which normally would mean his girlfriend's/wife's testimony against him could no longer be compelled.<sup>16</sup> But even without the availability of the adverse spouse privilege, the marriage has the effect of suggesting that the law can stand down, that everything is okay, that it was just a spat. Tice applies for a pretrial intervention program that will spare him prison time and expunge the arrest from his record. Three weeks later, a court accepts his bid for intervention (anger management classes) in lieu of prison. Two days later, Tice and his now-wife hold a press conference during which Tice publicly apologizes to everyone who was affected by the situation "me and my wife were in."<sup>17</sup> Then his wife takes the podium and apologizes for *her* actions, stating, "I do deeply regret the role that I played in that incident that night."<sup>18</sup>

*Story Number Two.* Ana and Dionisios, two recent Greek immigrants working in a paper mill in Camas, Washington, with family back "in the old

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<sup>14</sup> See Louis Bien, *A Complete Timeline of the Ray Rice Assault Case*, SBNATION.COM, (Nov. 11, 2014), <http://www.sbnation.com/nfl/2014/5/23/5744964/ray-rice-arrest-assault-statement-apology-ravens>; Michael Powell, *What Were They Thinking? Ugly Video, Blind Justice*, N.Y. TIMES, Sept. 14, 2014, at SP1.

<sup>15</sup> See Bien, *supra* note 14. The surveillance video can be found at TMZ.com. *Ray Rice – Elevator Knockout Raw Footage*, TMZ [http://www.t TMZ.com/videos/0\\_8lll4tx8/](http://www.t TMZ.com/videos/0_8lll4tx8/) (last visited March 21, 2016).

<sup>16</sup> Normally, marriage would trigger a spousal privilege. However, New Jersey disallows the privilege when the spouse-defendant is charged with a crime against the non-defendant spouse. See N.J. R. EVID. 501(2).

<sup>17</sup> *Full Transcript from Ray Rice News Conference*, BALTIMORE SUN (May 23, 2014), <http://www.baltimoresun.com/sports/ravens/ravens-insider/bal-full-transcript-from-ray-rice-news-conference-20140523-story.html>.

<sup>18</sup> *Id.*

country,” are boarders in the same house, and occasionally socialize together.<sup>19</sup> From Ana’s point of view, the relationship is completely platonic, they’re just friends, no “friend with benefits” here. She’s pretty sure she can trust Dionisios, but that all changes when they go out together to celebrate Greek Easter, and they both have several beers, and Ana essentially passes out drunk, and Dionisios rapes her.<sup>20</sup> Afterwards, when she confronts Dionisios, he dismisses what happened, saying, “You’re all right, it did not hurt you.”<sup>21</sup> This story takes place at a time when to be raped is to be disgraced,<sup>22</sup> so it is Ana who begs Dionisios not to tell anyone what happened.<sup>23</sup> But Dionisios being Dionisios, ignores her request. He brags about having had his way with Ana to his friends, who, in turn, begin to make laughing and suggestive remarks to Ana.<sup>24</sup> Ana, unable to take it anymore, enters Dionisios’s bedroom at night, finds him asleep in bed, and fires five shots into his head, killing him.<sup>25</sup> She’s later convicted of murder in the first degree.<sup>26</sup> Did I mention that none of these stories have happy endings, unless you count the first story’s “he beat me, he married me” as a happy ending?

*Story Number Three.* This story also ends with a killing, but it makes sense to begin with the beginning.<sup>27</sup> A courtship. A wedding. Children. And a marriage of twenty-five years,<sup>28</sup> making it to the coveted silver anniversary. Not that these twenty-five years were all blissful. In fact, the last twenty were pretty hellish. Five years into the marriage, the husband began to drink.<sup>29</sup> And he began to beat his wife.<sup>30</sup> For example, when the wife was pregnant with the last of their five children, her husband beat her and kicked her down a flight of steps.<sup>31</sup> For example, the husband, who was mostly unemployed, forced his wife to support

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<sup>19</sup> The story is based on *State v. Gounagias*, 153 P. 9, 10 (Wash. 1915), which appears in several criminal law casebooks to illustrate that a defendant charged with murder may lose his ability to claim provocation, or that he acted in the “heat of passion,” if he had a reasonable opportunity for the passion to cool.

<sup>20</sup> *Id.* at 9.

<sup>21</sup> *Id.* at 10.

<sup>22</sup> See, e.g., Corey Rayburn, *Better Dead than R(ap)ed?: The Patriarchal Rhetoric Driving Capital Rape Statutes*, 78 ST. JOHN’S L. REV. 1119 (2004).

<sup>23</sup> *Gounagias*, 153 P. at 10.

<sup>24</sup> *Id.* at 10.

<sup>25</sup> *Id.* at 9.

<sup>26</sup> *Id.* at 10.

<sup>27</sup> This “story” is roughly based on the criminal law casebook staple, *State v. Norman*, 366 S.E.2d 586 (N.C. Ct. App. 1988).

<sup>28</sup> *Id.* at 587.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

them both by prostituting herself.<sup>32</sup> If she did not make at least \$100 a day, he would beat her, apparently hoping that would “learn” her.<sup>33</sup> For example, he would refer to her as a dog, a bitch, a whore, and beat her, especially when other people were around.<sup>34</sup> In other words, he liked to “show off.”<sup>35</sup> For example, he would sometimes prohibit her from eating for days, or make her bark like a dog and force her to eat dog or cat food.<sup>36</sup> Everything kept going from bad to worse. And the police were not much help, even after she tried to overdose, was rushed to the hospital, and a therapist concluded that she was depressed and hopeless.<sup>37</sup> Did I mention everything kept getting worse? The day after the wife left the hospital, her husband made her drive him and his best friend to another town so that the friend could pick up a paycheck. During the drive, the wife made the mistake of driving too close to a truck. Maybe she was asking for it? The husband responded by slapping her, pouring a beer over her head, and kicking her while she was driving. He told her he should “cut her breast off and shove it up her rear end.”<sup>38</sup> Later at home, he beat her again. No police arrived even though they were called. After beating her—you have to love this, you can’t make this stuff up—the husband took a nap. It was while he was napping that the wife went to her mother’s house nearby, got a pistol, returned to the house, and shot him while he slept.<sup>39</sup> Maybe he was asking for it? Like Ana in story number two, the wife knew where to aim. She shot him in his head, killing him.<sup>40</sup> She’s convicted of voluntary manslaughter.<sup>41</sup>

Those are the three stories. A domestic violence story. A rape story. A self-defense, battered spouse story. The reason I chose these stories may seem obvious: Collectively they illustrate areas where the law seems inadequate, such as in non-stranger sexual assault crimes; where for a long time we have been troubled by the law’s reluctance to intervene, such as in the affairs between a man and his wife, in the sanctum of a man’s castle;<sup>42</sup> and where the law seemed to rely

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<sup>32</sup> *Id.*

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.*

<sup>37</sup> *Id.* at 588.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 588–89.

<sup>40</sup> *Id.* at 589.

<sup>41</sup> *Id.* at 586.

<sup>42</sup> See Reva B. Siegel, “*The Rule of Love*”: *Wife Beating as Prerogative and Privacy*, 105 YALE L.J. 2117 (1996); JEANNIE SUK, *AT HOME IN THE LAW: HOW THE DOMESTIC VIOLENCE REVOLUTION IS TRANSFORMING PRIVACY* (2009); Bennett Capers, *Home is Where the Crime Is*, 109 MICH. L. REV. 979 (2011). Indeed, the home is at the core of the Fourth Amendment protections. *Florida v. Jardines*, 133 S. Ct. 1409, 1414 (2013) (“At the Amendment’s ‘very core’ stands ‘the right

on rules that disadvantaged women (“boys rules” for self-defense).<sup>43</sup> But actually, that’s not the reason I chose these three stories at all. I chose them because, for me at least, they illustrate the inadequacies and shortcomings of the term “violence against women.”

### III. WOMEN

First, these cases illustrate that the term violence against women may obscure and render invisible other individuals who experience sexual or intimate partner violence. I mentioned earlier that I was changing some of the names and switching some of the details in the stories. The reason was not to protect the identity of the victims, which in itself is problematic,<sup>44</sup> but to show how focusing on gender—as in “violence against women”—has its advantages and disadvantages. I told three stories which would appear to illustrate examples of violence against women. But in fact, the case of Ana who has too much to drink and is raped by her co-worker is a real case involving two Greek immigrant men, John Gounagias and his rapist, Dionisios Grounas. The case, *State v. Gounagias*,<sup>45</sup> appears in several criminal law casebooks,<sup>46</sup> but curiously not in the rape chapters. Instead, it appears in chapters on provocation to explain that the “heat of passion” defense was historically denied when a reasonable cooling off period had passed between the trigger and the homicide.<sup>47</sup>

One of the justifications for the “violence against women” frame has been the numbers, and that women are more likely to be victims. Numbers do bear this out.

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of a man to retreat into his own home and there be free from unreasonable governmental intrusion.””) (quoting another source).

<sup>43</sup> See, e.g., CYNTHIA K. GILLESPIE, *JUSTIFIABLE HOMICIDE: BATTERED WOMEN, SELF-DEFENSE, AND THE LAW* (1989); Deborah Kochan, *Beyond the Battered Woman Syndrome: An Argument for the Development of New Standards and the Incorporation of a Feminine Approach to Ethics*, 1 HASTINGS WOMEN’S L.J. 89, 95–98 (1989).

<sup>44</sup> See Deborah W. Denno, *Perspectives on Disclosing Rape Victims’ Names*, 61 FORDHAM L. REV. 1113 (1993); Aviva Orenstein, *Special Issues Raised by Rape Trial*, 76 FORDHAM L. REV. 1585 (2007).

<sup>45</sup> 153 P. 9 (1915).

<sup>46</sup> See, e.g., JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, *CRIMINAL LAW: CASES AND MATERIALS* 349 (6th ed. 2008); MARKUS D. DUBBER & MARK G. KELMAN, *AMERICAN CRIMINAL LAW: CASES, STATUTES, AND COMMENTS* 926–28 (2005); SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 413 (7th ed. 2001); JOSHUA DRESSLER, *CASES AND MATERIALS ON CRIMINAL LAW* 270 (5th ed. 2009).

<sup>47</sup> DRESSLER, *supra* note 46, at 264. The simple explanation for why this case does not appear in chapters on rape is because rape was not charged. The more complicated, and pedagogically useful, explanation is that it is very likely this “rape” would not have been recognized as such by the law, which historically defined rape in gendered terms. See Capers, *Real Rape Too*, *supra* note 12, at 1288–90. As such, the law participated in rendering male victim rape invisible, or cloaking it by naming it a “crime against nature” or sodomy, for which consent was irrelevant. Capers, *Real Rape Too*, *supra* note 12, at 1291.

As I mentioned earlier, one in three women have experienced domestic violence. But the number for men is not that different: one in four.<sup>48</sup> The term "violence against women" obscures this. For women and rape, the oft-quoted ratio is one in five.<sup>49</sup> Ascertaining an accurate number for rape is notoriously difficult, not least because of definitional problems and the reluctance of women to report rape. These difficulties are only compounded when it comes to men. Even more than female victims, male rape victims are likely to encounter disbelief or derision when they report their victimization. In addition, male victims, both straight and gay, face the added risk of homophobia. As one male victim of rape put it, "All men find rape difficult to believe or accept—if you let it happen you must be queer, if you're not queer it can't have happened."<sup>50</sup> Michael Scarce makes a similar observation in his book *Male on Male Rape*:

We can easily believe that a child might not be able to defend himself against an adult, but the sexual violation of a man may come as something of a shock, for men have traditionally been expected to defend their own boundaries and limits while maintaining control, especially sexual control, of their own bodies. When this does not occur, when men are raped by other men, society tends to silence and erase them rather than acknowledge the vulnerability of masculinity and manhood.<sup>51</sup>

The fact that reporting agencies are often gendered in name—e.g., Crisis Center for Women—may also function as a barrier to male victimization reporting.<sup>52</sup> Agencies are often unequipped to address male victimization,<sup>53</sup> ill at ease in providing services to male victims, and sometimes explicitly refuse services to male victims.<sup>54</sup> All of this contributes to under-reporting. As such, the numbers we do have about male victimization—which numbers are troubling in themselves—likely only begin to reveal the gravity of the problem.

Here are some of the numbers. A study conducted by the Bureau of Justice Statistics, based on surveys of households, estimated that one in thirty-three men in

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<sup>48</sup> NAT'L CTR. FOR INJURY PREVENTION AND CONTROL, *supra* note 1.

<sup>49</sup> *Id.*

<sup>50</sup> Michael B. King, *Male Sexual Assault in the Community*, in MALE VICTIMS OF SEXUAL ASSAULT 1, 5 (Gillian C. Mezey & Michael B. King eds., 1992).

<sup>51</sup> MICHAEL SCARCE, *MALE ON MALE RAPE: THE HIDDEN TOLL OF STIGMA AND SHAME* 9 (1997).

<sup>52</sup> See Kiran Mehta, *Male Rape Victims: Breaking the Silence*, 13 PUB. INT. L. REP. 93 (2008) (discussing the problem of gendered crisis centers).

<sup>53</sup> One study found that only five percent of victim services agencies that serve male victims have any programs or services specifically designed for men. See Patricia A. Washington, *Second Assault of Male Survivors of Sexual Violence*, 14 J. INTERPERSONAL VIOLENCE 713, 715 (1999).

<sup>54</sup> Richard Tewksbury, *Effects of Sexual Assaults on Men: Physical, Mental and Sexual Consequences*, 6 INT'L J. MEN'S HEALTH 22, 26 (2007).

the United States has been the victim of rape or attempted rape.<sup>55</sup> Smaller studies also reveal that male victimization occurs more frequently than many realize. For example, a community-wide study in Los Angeles found that 7.2% of the men surveyed reported at least one incident after the age of 15 where they had been sexually assaulted.<sup>56</sup> Studies focusing on cases in hospital emergency rooms and rape crisis centers have found that between 4% and 12% of sexual assault victims seeking medical treatment are male.<sup>57</sup> Indeed, research suggests that a significant percentage of male sexual victimization occurs in hyper-masculine environments, including fraternities<sup>58</sup> and sports teams.<sup>59</sup> Even in the military, where sexual assaults on women have gained much attention, male victimization is significant. In fact, of the 26,000 reports of unwanted sexual assault in the military in 2012, 53 percent involved sexual attacks on men, mostly by other men.<sup>60</sup> As the *New York*

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<sup>55</sup> *Id.* at 23–24.

<sup>56</sup> Susan B. Sorenson et al., *The Prevalence of Adult Sexual Assault*, 126 AM. J. EPIDEMIOLOGY 1154, 1158 (1987).

<sup>57</sup> Bruce D. Forman, *Reported Male Rape*, 7 VICTIMOLOGY 235, 235–36 (1982); Patricia A. Frazier, *A Comparative Study of Male and Female Rape Victims Seen at a Hospital-Based Rape Crisis Program*, 8 J. INTERPERSONAL VIOLENCE 64, 65–76 (1993); Cécile Grossin et al., *Analysis of 418 Cases of Sexual Assault*, 131 FORENSIC SCI. INT'L 125, 125–30 (2003); Arthur Kaufman et al., *Male Rape Victims: Noninstitutionalized Assault*, 137 AM. J. PSYCHIATRY 221, 221–23 (1980); Gene R. Pesola et al., *Emergency Department Characteristics of Male Sexual Assault*, 6 ACAD. EMERGENCY MED. 792, 792–98 (1999); Netti Riggs et al., *Analysis of 1,076 Cases of Sexual Assault*, 35 ANN. EMERGENCY MED. 358, 358–60 (2000); Lana Stermac et al., *Sexual Assault of Adult Males*, 11 J. INTERPERSONAL VIOLENCE 52, 52 (1988).

<sup>58</sup> For example, a surprising number of male victim sexual assaults, including gang rapes, occur in fraternities, ostensibly as part of hazing rituals. ALAN McEVOY ET AL., *IF HE IS RAPED 12* (2003) (discussing gang rapes in the context of hazings); see also Scarce, *supra* note 51 at 51–56 (discussing male sexual victimization in fraternities).

<sup>59</sup> Consider a few recent examples. In Ohio, several members of the Tallmadge High School football team faced rape charges in connection with the sexual assault of another team member. According to police records, they sodomized a teammate with a foreign object. See Tom Gaffney, *Hazing Allegations Overshadow Team: Undefeated Tallmadge Now Six Players Short*, OHIO.COM (Oct. 9, 2007), [www.ohio.com/news/10334312.html](http://www.ohio.com/news/10334312.html). More recently, several male teens in Tampa, Florida were arrested for sodomizing a teammate with a broomstick and hockey stick. See Kameel Stanley, *Walker Middle School Student Says Bullies Were Targeting Him Since Mid-March*, TAMPA BAY TIMES (May 9, 2009), <http://www.tampabay.com/news/publicsafety/crime/walker-middle-school-student-says-bullies-were-targeting-him-since-mid/999687>; John Couwels, *4 Teens Charged as Adults in Locker Room Sexual Assault Case*, CNN (June 4, 2009), <http://www.cnn.com/2009/CRIME/06/04/florida.sexual.assault/index.html>. Even more recently, three high school basketball players in Tennessee were charged with raping a male teammate with a pool stick. See Phil Gast & Tessa Carletta, *Season Called Off for Tennessee Boys' Basketball Team After Rape Charges*, CNN (Jan. 6, 2016), <http://www.cnn.com/2016/01/06/us/tennessee-high-school-team-assault/>.

<sup>60</sup> James Dao, *In Debate Over Military Sexual Assault, Men Are Overlooked Victims*, N.Y. TIMES, June 24, 2013, at A12. A study based in a clinic serving a population of Navy and Marine Corp men also found significant male sexual victimization in the military setting. Peter F. Goyer & Henry C. Eddleman, *Same-Sex Rape of Nonincarcerated Men*, 141 AM. J. PSYCHIATRY 576, 576–79



*Times* has reported, the underappreciated truth is that the “majority of service members who are sexually assaulted each year are men.”<sup>61</sup>

The one area where we imagine male victim rape—indeed, we joke about it,<sup>62</sup> we watch it as entertainment<sup>63</sup>—is prison, and here too the numbers, which again are likely conservative, are eye-opening. Consider studies based on inmate surveys. In a 2000 study of male inmates at several prisons across four states, 21% of the inmates reported pressured or forced sexual contact, and 7% of the inmates reported they had been raped.<sup>64</sup> In a separate study, 22% of the male inmates in Nebraska reported pressured or forced sex, and half of these inmates reported being the victim of forced anal sex.<sup>65</sup> The most detailed data to date comes from the recent, and “mostly hortatory,”<sup>66</sup> Prison Rape Elimination Act of 2003,<sup>67</sup> which requires data collection by the U.S. Department of Justice.<sup>68</sup> These numbers indicate that 4.5% of inmates report sexual victimization during the prior twelve months, with inmates at several facilities reporting victimization rates during the last twelve months in excess of 9%.<sup>69</sup> Overall, numbers collected by the Department of Justice indicate that 13% of all inmates in the United States have been sexually victimized in prison.<sup>70</sup> Even these numbers still obscure the reality

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(1984). Another study found that approximately 6.7% of the male members of the U.S. Army have been sexually victimized. Lee Martin et al., *Prevalence and Timing of Sexual Assaults in a Sample of Male and Female U.S. Army Soldiers*, 163 MIL. MED. 213, 213–16 (1998).

<sup>61</sup> Dao, *supra* note 60 at A12.

<sup>62</sup> One recent example is the coverage given to former Subway spokesperson Jared Fogle following his plea of guilty to child pornography charges. The headline from the *New York Post* on Aug. 20, 2015 is another example: “*Subway Jared Underage Sex Shock: Enjoy a Foot Long in Jail.*” For more examples, see Capers, *Real Rape Too*, *supra* note 12, at 1262 n. 20.

<sup>63</sup> One popular example was the HBO series *Oz*, which routinely showed men being raped in prison. Rape clips from the show are available on YouTube. See, e.g., *OZ Schillinger Aryans Rapes Peter Schibetta on the Pool Table*, YOUTUBE (Dec. 19, 2011), [https://www.youtube.com/watch?v=iAU9IEkdT\\_M](https://www.youtube.com/watch?v=iAU9IEkdT_M). Interestingly, one viewer commented, “The way he screams makes me horny. I’d rape him too.” Comment to *OZ Schillinger Aryans Rapes Peter Schibetta on the Pool Table*, YOUTUBE (Dec. 19, 2011), [https://www.youtube.com/watch?v=iAU9IEkdT\\_M](https://www.youtube.com/watch?v=iAU9IEkdT_M).

<sup>64</sup> Cindy Struckman-Johnson & David Struckman-Johnson, *Sexual Coercion Rates in Seven Midwestern Prison Facilities for Men*, 80 PRISON J. 379, 385 (2000).

<sup>65</sup> *Id.* A study of inmates in three mid-western states reached a similar conclusion, finding that approximately 20% of inmates reported pressured or forced sex; 10% reported they had been raped while incarcerated. Janet Anderson, *Prison Rape and Sexual Coercion Behind Bars*, RES. & ADVOC. DIG., May 2005 at 1 (citing *Id.*).

<sup>66</sup> Alice Ristroph, *Sexual Punishments*, 15 COLUM. J. GENDER & L. 139, 175 (2006).

<sup>67</sup> 42 U.S.C. §§ 15601–15609 (2012).

<sup>68</sup> *Id.*

<sup>69</sup> ALLEN J. BECK & PAIGE M. HARRISON, BUREAU OF JUSTICE STATISTICS, U.S. DEP’T OF JUSTICE, NCJ 221946, BJS SPECIAL REPORT: SEXUAL VICTIMIZATION IN STATE AND FEDERAL PRISONS REPORT BY INMATES, 2007 2 (2008).

<sup>70</sup> *Id.*

of repeated victimization.<sup>71</sup> Once victimized, a prison rape victim often “must repay his rapist for the violence perpetrated on him by dedicating himself to serving his assailant’s needs for sometimes years thereafter.”<sup>72</sup>

Again, for a host of reasons—definitional hurdles,<sup>73</sup> reporting hurdles, and the fear of being perceived as homosexual—the numbers for male victim sexual assault both in and outside of prison are likely conservative. In short, even though male sexual victimization is usually confined to “the margins, the footnotes, and indeed the closet,”<sup>74</sup> in fact “while rape is often done by men, it is also done to men.”<sup>75</sup>

The point here is not to engage in a victimization contest. This is not a competition. But the question should be asked: What are the advantages and disadvantages of talking about “violence against *women*”? The term “violence against women” has become such a rallying cry that too often we ignore its disadvantages. To what extent does “violence against women” reify the notion that women are the weaker sex, and open the door to paternalistic (or should I say maternalistic) ideas about women?<sup>76</sup> To what extent does it over-determine and entrench gender difference at a time when we aspire to gender equality? Certainly, since “violence against women” uses gender as a proxy for vulnerability, which is its own type of sex stereotyping, we should think twice before we embrace this language.

In fact, given these disadvantages, Martha Fineman’s suggestion that we instead focus directly on vulnerability may seem a welcome intervention.<sup>77</sup>

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<sup>71</sup> It is estimated that approximately two-thirds of prison rape victims are repeatedly raped, many on a daily basis. SCARCE, *supra* note 51, at 36–37. The story of Donald Stephenson is but one example. Arrested for participating in a non-violent protest in Washington, D.C., Donaldson found himself in a jail where approximately 60 men in the course of 24 hours raped him. Upon his release, he spent a week in a veteran’s hospital undergoing and recovering from rectal surgery. Based on this experience, Donaldson became an advocate against prison rape and founded the organization Stop Prison Rape. *Id.* at 36.

<sup>72</sup> Michael B. King, *Male Rape in Institutional Settings*, in MALE VICTIMS OF SEXUAL ASSAULT 68 (Gillian C. Mezey & Michael B. King eds., 1992).

<sup>73</sup> For example, until recently, the Uniform Crime Reporting Program defined rape as requiring a female victim. CRIME IN THE UNITED STATES 2009, at 15 (3d ed. 2009).

<sup>74</sup> Capers, *Real Rape Too*, *supra* note 12, at 1308.

<sup>75</sup> *Id.*

<sup>76</sup> See Julie Goldscheid, *Gender Neutrality and the “Violence Against Women” Frame*, 5 U. MIAMI RACE & SOC. JUST. L. REV. 307, 316 (2015).

<sup>77</sup> Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, 20 YALE J.L. & FEMINISM 1 (2008) [hereinafter *The Vulnerable Subject*]. Fineman has returned to and expanded upon her vulnerability theory in a number of articles. See, e.g., Martha Albertson Fineman, *Beyond Identities: The Limits of an Antidiscrimination Approach to Equality*, 92 B.U. L. REV. 1713, 1718–19 (2012); Martha Albertson Fineman, *Feminism, Masculinities, and Multiple Identities*, 13 NEV. L.J. 619, 634–35 (2013); Martha Albertson Fineman, *The Vulnerable Subject and the Responsive State*, 60 EMORY L.J. 251, 267–70 (2010). Her proposal has also

Although Fineman focuses on anti-discrimination law and its litany of protected categories, her conceptual turn to vulnerability seems analytically helpful for thinking across areas of the law such as criminal justice broadly, and “violence against women” specifically. According to Fineman, our current strategies of confronting inequities by focusing on certain groups—such as women, such as African Americans, such as the less-abled—has “largely eclipsed, even become a substitute for, the goal of eliminating material, social, and political inequalities that exist across groups.”<sup>78</sup> Such categories, she notes, “are both over and under inclusive,”<sup>79</sup> and have proved inadequate to “dismantling broad systems of disadvantage.”<sup>80</sup> Vulnerability as a heuristic device, by contrast, has the potential to describe “a universal, inevitable, enduring aspect of the human condition”<sup>81</sup> that has the ability to affect us all. As such, it can facilitate a mobilization “around the concept of shared, inevitable vulnerability . . . to more easily build coalitions among those who have not benefited as fully as others from current social organization.”<sup>82</sup> Though Fineman’s argument is richer and deeper than this précis allows, at bottom, her argument is straightforward: Law should protect all of us who are vulnerable, whether we’re male or female, young or old, black or white, abled or less-abled, and mobilizing around shared vulnerabilities as opposed to identity groups may be a productive way to accomplish this. Returning to the “violence against women” frame, there may be overlap between vulnerability and gender, but they need not be coterminous. So maybe we should talk about violence against those who are vulnerable. Allow me to return to this later.

#### IV. VIOLENCE

The second point illustrated by the stories I began with is the inadequacy of the term “violence.” The law rushes in, or at least these days claims its willingness to rush in, when a fist is used, when an eye is blackened, or a jaw is broken. Otherwise the law tends to keep its distance.<sup>83</sup> When we keep using the term “violence against women,” do we inadvertently deflect attention from all the other non-violent harms intimate partners may suffer? Consider again the case of Mrs.

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spawned a collection of essays. See *VULNERABILITY: REFLECTIONS ON A NEW ETHICAL FOUNDATION FOR LAW AND POLITICS* (Martha Albertson Fineman & Anna Grear eds., 2013).

<sup>78</sup> Fineman, *The Vulnerable Subject*, *supra* note 77, at 4.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 17.

<sup>81</sup> *Id.* at 8.

<sup>82</sup> *Id.* at 17.

<sup>83</sup> For example, New York has several laws criminalizing assault, aggravated harassment, stalking, and menacing. See, e.g., N.Y. PENAL LAW §§ 120.00, 240.30, 120.45, and 120.15 (McKinney). It does not however criminalize psychological abuse. California similarly focuses on physical harm. See, e.g., CAL. PENAL CODE §§ 273.5, 243(e)(1), and 422 (West).

Norman (the third story, taken from *State v. Norman*<sup>84</sup>), who killed her husband of twenty-five years after suffering twenty years of abuse. To be sure, the physical abuse, both carried out and threatened, was traumatic: He routinely beat her, put out cigarette butts on her skin, once smashed glass in her face, and threatened to “cut her breast off and shove it up her rear end.”<sup>85</sup> But traumatic too was the non-physical abuse. Her husband commonly called her a dog, a bitch, and a whore, especially “when other people were around, to ‘show off.’”<sup>86</sup> Sometimes he refused to let her eat; other times he required her to bark like a dog and to eat dog or cat food out of the dog or cat bowl.<sup>87</sup> Still other times, he would force her to sleep on the concrete floor of their house.<sup>88</sup> The day before she killed him, her husband coupled physical abuse with psychological abuse. According to the opinion, her husband beat her, and “threw glasses, ashtrays, and beer bottles at her.”<sup>89</sup> This is what happened next:

[Her husband] asked [his wife] to make him a sandwich; when [she] brought it to him, he threw it on the floor and told her to make him another. [She] made him a second sandwich and brought it to him; [her husband] again threw it on the floor, telling her to put something on her hands because he did not want her to touch the bread. [Mrs. Norman] made a third sandwich using a paper towel to handle the bread. [He] took the third sandwich and smeared it in [her] face.<sup>90</sup>

Does it really make sense for the law to separate, as it usually does, a husband beating his wife from a husband calling her a bitch, a dog, or a whore in public? Does it make sense to separate a husband pouring beer over his wife’s head and making her eat dog food, from a husband raising his hand to his wife? Let me put this another way. When we think of abuse victims who kill their abusers, we often invoke the battered spouse syndrome as a way of explaining the “why” and “why now” of the homicide.<sup>91</sup> But the earmarks of the syndrome—the learned helplessness, the lack of self-confidence, the feeling of dependence—cannot solely

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<sup>84</sup> 366 S.E.2d 586 (N.C. Ct. App. 1988).

<sup>85</sup> *Id.* at 588.

<sup>86</sup> *Id.* at 587.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.* at 588.

<sup>89</sup> *Id.* at 587.

<sup>90</sup> *Id.* at 588.

<sup>91</sup> “The clear trend is to permit [battered spouse] syndrome evidence in cases of confrontation homicides” where “the defendant presents evidence of a history of abuse.” JOSHUA DRESSLER, CASES AND MATERIALS ON CRIMINAL LAW 532 (3d ed. 2003). The term “battered spouse syndrome” can be traced to psychologist Dr. Lenore Walker. See LEONORE WALKER, THE BATTERED WOMAN SYNDROME (2d ed. 1984); LEONORE WALKER, THE BATTERED WOMAN (1979).

be the result of the physical battering. For many, there is the cycle of physical abuse alternating with periods of contrition and pleas for forgiveness. As one court put it:

The cyclical nature of battering behavior helps explain why more women simply do not leave their abusers. The loving behavior demonstrated by the batterer during phase three reinforces hopes these women might have for their mate’s reform and keep them bound to the relationship.<sup>92</sup>

While the notion that all battered spouses experience these cycles has been criticized,<sup>93</sup> what is not in dispute is that many battered victims experience a psychological battering, a wearing down and wearing away of the spirit, a psychological abuse and diminishment. For many of us, the goal is to provide protection from that kind of abuse too.<sup>94</sup> To be clear, criminal law is beginning to recognize emotional harms, but only tentatively.<sup>95</sup> So the question should be asked: Do we undercut that goal when we continue to talk about violence against women, without at least adding that violence is not only physical?

#### V. BECOMING THE SUBJECT

Thus far, I have identified two concerns. The first concern was with the term “women.” The second concern was with the term “violence.” I also promised to return to Martha Fineman’s suggestion that we think in terms of vulnerability, and I make good on that promise now. Imagine a world in which the law protected all of us based on shared vulnerability, without regard to gender or age or class or beauty. It could protect women in abusive relationships. It could protect transgender individuals who, more than any other group, are targeted for harassment and violence on the street.<sup>96</sup> It could protect the thousands of men who

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<sup>92</sup> State v. Kelly, 478 A.2d 364, 371–72 (1984).

<sup>93</sup> See, e.g., David L. Faigman & Amy J. Wright, *The Battered Woman Syndrome in the Age of Science*, 39 ARIZ. L. REV. 67 (1997); Alafair S. Burke, *Rational Actors, Self-Defense, and Duress: Making Sense, Not Syndromes, Out of the Battered Woman*, 81 N.C. L. REV. 211 (2002). For a racial critique of the syndrome, see Linda L. Ammons, *Mules, Madonnas, Babies, Bathwater, Racial Imagery and Stereotypes: The African-American Woman and the Battered Woman Syndrome*, 1995 WIS. L. REV. 1003 (1995).

<sup>94</sup> One of the most vocal legal scholars on the position that abuse victims should be able to physically defend themselves against psychological degradation is Charles Patrick Ewing. See CHARLES PATRICK EWING, *BATTERED WOMEN WHO KILL: PSYCHOLOGICAL SELF-DEFENSE AS LEGAL JUSTIFICATION* (1987); Charles Patrick Ewing, *Psychological Self-Defense: A Proposed Justification for Battered Women Who Kill*, 14 LAW & HUM. BEHAV. 579 (1990).

<sup>95</sup> See Avlana K. Eisenberg, *Criminal Infliction of Emotional Distress*, 113 MICH. L. REV. 607 (2015); Adam J. Kolber, *The Experiential Future of Law*, 60 EMORY L.J. 585 (2011).

<sup>96</sup> See, e.g., Cynthia Lee & Peter Kwan, *The Trans Panic Defense: Masculinity, Heteronormativity, and the Murder of Transgender Women*, 66 HASTINGS L.J. 77 (2014).

are raped, and gang raped, in prison every year.<sup>97</sup> It could protect the male middle school student who, as part of the hockey team hazing, gets a hockey stick shoved up his ass.<sup>98</sup> And it could protect them, and us, from psychological and emotional abuse too. The name-calling. The sneers. The bullying and belittling. In short, it could protect everyone.

So thinking about “vulnerability” instead of “violence against women” has its appeal. Still, I find myself resisting it.<sup>99</sup> My concern is that vulnerability suggests weakness in a way that invites paternalism—or given that much of the impetus for protecting women *for their own good* comes from other women, maternalism. We see this maternalism in no-drop policies that require law enforcement officers to make an arrest in domestic violence cases, and require prosecutors to bring charges, notwithstanding the views of the domestic violence victim.<sup>100</sup> We see this in protection orders that are often negotiated without the consent of the alleged victim.<sup>101</sup> We see this in the domestic violence trials that continue to go forward, notwithstanding the Supreme Court’s recent reinvigoration of the Confrontation Clause,<sup>102</sup> without the cooperation or testimony of the alleged victim.<sup>103</sup>

All of this has class and race implications. It is one thing for those of us who are relatively privileged and who are not victims of abuse to say that abusers must be locked up. It is another thing entirely for us to say this on behalf of, and in effect speak for, those who are not so privileged.<sup>104</sup> Consider the domestic violence victim who may be evicted without the abuser’s contribution to the rent. Or the victim with children, who feels conflicted about having their father incarcerated.<sup>105</sup> Or the minority victim who knows from experience and from

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<sup>97</sup> Capers, *Real Rape Too*, *supra* note 12.

<sup>98</sup> I am referring here to an incident in which several male teens in Tampa, Florida were arrested for sodomizing a teammate with a broomstick and hockey stick. See Stanley, *supra* note 59; Couwels, *supra* note 59.

<sup>99</sup> Others have also found themselves resisting Fineman’s approach. For a cogent critique, see Frank Rudy Cooper, *Always Already Suspect: Revising Vulnerability Theory*, 93 N.C. L. REV. 1339 (2015).

<sup>100</sup> Cheryl Hanna, *No Right to Choose: Mandated Victim Participation in Domestic Violence Prosecutions*, 109 HARV. L. REV. 1849, 1861–63 (1996).

<sup>101</sup> SUK, *supra* note 42, at 36–38.

<sup>102</sup> Tom Liniger, *Prosecuting Batterers After Crawford*, 91 VA. L. REV. 747, 755 (2005); Myrna S. Raeder, *Being Heard After Giles: Comments on The Sounds of Silence*, 87 TEX. L. REV. 105 (2009).

<sup>103</sup> See Bennett Capers, *Reading Michigan v. Bryant*, “Reading” *Justice Sotomayor*, 123 YALE L.J. FORUM 427, 429–31 (2014).

<sup>104</sup> Cf. Gayatri Chakravorty Spivak, *Can the Subaltern Speak?*, in MARXISM AND THE INTERPRETATION OF CULTURE 271 (Cary Nelson & Lawrence Grossberg eds., 1988).

<sup>105</sup> Renée Römkens, *Protecting Prosecution: Exploring the Powers of Law in an Intervention Program for Domestic Violence*, 12 VIOLENCE AGAINST WOMEN 160, 175, 181 n.9 (2006).

community “pools of knowledge”<sup>106</sup> about racialized policing,<sup>107</sup> about racially disparate sentencing,<sup>108</sup> about how a conviction will only compound difficulties minorities have in securing employment and housing,<sup>109</sup> or in matters of immigration.<sup>110</sup> Now add to this the increasing risk—a byproduct of mandatory arrest laws—that the victim will be arrested alongside the abuser. These “joint” arrests too have racial and class consequences.<sup>111</sup> A 2001 study of domestic violence arrests in New York City found that, of the individuals who were arrested alongside their putative abusers, 66% were African-American or Hispanic, 43% were living below the poverty line, and 19% were receiving public assistance.<sup>112</sup> In short, victims, especially minority victims,<sup>113</sup> were penalized for not being “victim” enough; for being un-feminine enough to fight back; for not being weak.<sup>114</sup> The plight of individuals in same-sex relationships is similarly unequal. Putative victim and abuser are often arrested in same-sex relationships—since the couple is of the same sex, police often assume “mutual combat.”<sup>115</sup>

So I am troubled by a turn to vulnerability, and what seems to me its inevitable byproduct, a maternalism that shortchanges agency and that replicates already troubling inequities. There is another reason I hesitate. I prefer not to think of John Gounagias, who killed his rapist, or Judy Norman, who killed her abusive husband, as vulnerable.

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<sup>106</sup> See Russell K. Robinson, *Perceptual Segregation*, 108 COLUM. L. REV. 1093, 1120 (2008).

<sup>107</sup> MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 103–06 (2010).

<sup>108</sup> *Id.* at 109–12; see also Angela P. Harris, *Gender, Violence, Race, and Criminal Justice*, 52 STAN. L. REV. 777, 779–80 (2000).

<sup>109</sup> Devah Pager, *Double Jeopardy: Race, Crime, and Getting a Job*, 2005 WIS. L. REV. 617, 619–21, 643 (2005).

<sup>110</sup> See, e.g., Mariela Olivares, *Battered by Law: The Political Subordination of Immigrant Women*, 64 AM. U. L. REV. 231 (2014).

<sup>111</sup> See Corinne Mason & Shoshana Magnet, *Surveillance Studies and Violence Against Women*, 10 SURVEILLANCE & SOC’Y 105, 113 (2012).

<sup>112</sup> *Id.*

<sup>113</sup> On how stereotypes of black women as being strong hurt black women in domestic violence cases, see Zanita E. Fenton, *Domestic Violence in Black and White: Racialized Gender Stereotypes in Gender Violence*, 8 COLUM. J. GENDER & L. 1 (1998); Ammons, *supra* note 93 at 1068–78; Leigh Goodmark, *When Is a Battered Woman Not a Battered Woman? When She Fights Back*, 20 YALE J.L. & FEMINISM 75 (2008).

<sup>114</sup> On the different treatment faced by women who do not fit proscribed gender norms, see generally Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183 (2002); Kendall Thomas, *Imagining Lesbian Legal Theory*, 8 N.Y. CITY L. REV. 505 (2005); Capers, *Real Women, Real Rape*, *supra* note 12.

<sup>115</sup> Andrea J. Ritchie, *Law Enforcement: Violence Against Women of Color*, in *COLOR OF VIOLENCE: THE INCITE! ANTHOLOGY* 138, 140 (2006).

In fact, when I think of John Gounagias and Judy Norman, or the countless, nameless others, what I find myself thinking about is castles, and what it means—jurisprudentially, and a matter of culture—to call a home a man’s castle,<sup>116</sup> or relatedly, to describe someone as the king of the castle.<sup>117</sup> If I am the other person in the castle, who am I exactly? Am I a subject, as in “(1) : one subject to a monarch and governed by the monarch's law (2) : one who lives in the territory of, enjoys the protection of, and owes allegiance to a sovereign power or state”?<sup>118</sup> And how do I go from being a subject, to making myself the subject of my own actions?<sup>119</sup> How do I gain agency?

Kings and castles then. This is what I think about when I think about kings and their castles. I think of someone having the authority to say to another person: *You're too slow, you're fat, shut up, you think too much, you never think, you're stuck up, shut up, you're nothing, you think you're special, you're trash, you're too dumb, you're too smart for your own good, you know that? You're asking for it, you're really asking for it. You're all right, it did not hurt you. You liked it. Shut up.*

When I think of John Gounagias or Judy Norman, I prefer to think of Gounagias and Norman as subjects becoming the subject and exercising agency. I think of them saying, *You know what? F\_ck you.* In fact, I prefer to think of them not as vulnerable, but as refusing to be ruled. I prefer to think of them as unruly citizens. In a good way. I think of them as asserting their right to personhood and autonomy and self-rule. For those who share this view, this suggests that the question should be: How can the law facilitate self-sovereignty? And protect self-sovereignty? But here is the thing. I mean not only the law protecting Norman’s ability to say screw you to her abusive husband, or Gounagias’s ability to say screw you to his roommate who raped him while he was passed out, but also Janay

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<sup>116</sup> As Linda McClain reminds us: “The image of the castle and its common law roots may suggest a hierarchical, patriarchal society in which women are under the authority and protection of men. The sense of enclosure of a castle, of a small society within, may also bring to mind married women's lack of separate identity and status as well as their vulnerability to sexual and other physical abuse at the hands of their husbands.” Linda C. McClain, *Inviolability and Privacy: The Castle, the Sanctuary, and the Body*, 7 YALE J.L. & HUMAN. 195, 233 (1995). For other feminist engagements with the notion of the castle as a cite for the subordination of women, see CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 193 (1989); Ruth Gavinson, *Privacy and the Limits of the Law*, 89 YALE L.J. 421, 464 & n.131 (1980); Robin West, *Reconstructing Liberty*, 59 TENN. L. REV. 441, 458 (1992); ANITA L. ALLEN, WHY PRIVACY ISN'T EVERYTHING: FEMINIST REFLECTIONS ON PERSONAL ACCOUNTABILITY (2003).

<sup>117</sup> Indeed, some years ago, when I was chairing the Planning Committee for the 2013 AALS Conference on Criminal Justice, I created and moderated a plenary panel on a similar topic, “A Man’s Castle?: The State, Crime, and the Home.”

<sup>118</sup> *Subject*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/subject?show=0&t=1421086303> (last visited March 27, 2016).

<sup>119</sup> As in “the one performing the action or being in the state expressed by the predicate.” *Subject*, WORDREFERENCE.COM, <http://www.wordreference.com/definition> (last visited March 27, 2016).



Palmer Rice’s ability to say screw you to her husband *and* to anyone who tells her she has to press charges, or that she should press charges, or that they know best.

More and more domestic violence advocates on the ground get this. They say, in effect, to those who have been injured, “I’m not going to call you a victim. I’m going to call you by your name. And I’m going to ask you what you want. Within reason, I’ll try to do what I can.” The task ahead—for prosecutors, for defense lawyers, for legislators, and yes, for scholars—is to imagine a criminal justice system that does the same.

## VI. CONCLUSION

What I have tried to advocate for, in this brief essay, is that we retire, or at least “take a break” from, focusing on “violence against women.” The term resonates, but it is under-inclusive. More troubling, in marking women as victims in need of special protection, it reifies a type of gender inequality and paternalism/maternalism that we should find deeply troubling. My concern too with the term “violence against women,” and with Fineman’s proposed intervention of “shared vulnerabilities,” is that it in fact may frustrate agency and autonomy. These are perhaps strange arguments to make, but I have never shied from making strange arguments. Hopefully I never will.